



Commonwealth of Virginia
Virginia Information Technologies Agency

SOFTWARE AND SERVICES

Optional Use Contract

Date: November 7, 2003

Contract #: VA-030700-ESRI

Authorized User: State Agencies, Institutions, and other Public Bodies
as defined in the VPPA

Contractor: Environmental Systems Research Institute, Inc. (ESRI)
8620 Westwood Center Dr.
Vienna, VA 22182

FIN: 95-2775732

Contact Person: See page 3

Pricing: see eVA catalog or contact vendor

FOB: Destination

Delivery: 7 Days ARO

Term: September 12, 2003 – September 11, 2005

Payment: Net 30 days

For Additional Information, Please Contact:

Contract Compliance Information:
Mrs. T. J. Hudson, CPPB, VCO
Contracts Administrator
Phone: 804-371-5971
E-Mail: tj.hudson@vita.virginia.gov
Fax: 804-371-5969

Technical Information:
Ann Sells, CPPB, VCO
Supply Chain Management
Virginia Information Technologies Agency
Phone: 804-371-5988
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Doug Crenshaw, VCO
E-Mail: doug.crenshaw@vita.virginia.gov
Fax: 804-371-5969

NOTES: Individual Commonwealth of Virginia employees are not authorized to purchase equipment or services for their personal use from this Contract.

For updates, please visit our Website at <http://www.asd.virginia.gov>

VIRGINIA INFORMATION TECHNOLOGIES AGENCY (VITA): Prior review and approval by VITA for purchases in excess of \$100,000.00 is required for State Agencies and Institutions only.

CONTRACT # VA-030700-ESRI
CONTRACT CHANGE LOG

[illegible]

<u>CONTRACTOR POINTS OF CONTACT</u>	
<u>ESRI-Virginia Territory Manager</u> Matthieu Denuelle, Territory Manager Environmental Systems Research Institute, Inc. 5313 Chestnut Bluff Terrace Midlothian, VA 23112 Tel: (804) 639-6783 Fax: (804) 639-4460 Email: mdenuelle@esri.com Web: http://www.esri.com	<u>ESRI-Washington D.C. Regional Office</u> ESRI ATTN: Joel Campbell, Regional Manager 8620 Westwood Center Drive Vienna, VA 22182 Tel: (703) 442-8892 or 442-9296 Tel: (703) 506-9515 or 506-9514 Hours: 8am to 5pm (Eastern) M-F
<u>ESRI Customer Support</u> Tel: (888) 377-4575 Fax: (909) 307-3082 Hours: 8am to 5pm (PST) M-F Email: info@esri.com	<u>ESRI Technical Support</u> Tel: (909) 793-3774 Fax: (909) 792-0960 Hours: 6am to 5pm (PST) M-F
<u>ESRI Corporate Headquarters</u> ESRI 380 New York Street Redlands, CA 92373-8100 Tel: (909) 793-2853 Fax: (909) 793-5953 Web: http://www.esri.com	

**MASTER ORDERING AGREEMENT
VA-030700-ESRI
(ESRI # 2003MPA2064)
BETWEEN
THE COMMONWEALTH OF VIRGINIA
AND
ENVIRONMENTAL SYSTEMS RESEARCH INSTITUTE, INC. (ESRI)**

1. SCOPE OF CONTRACT

This is a Master Ordering Agreement (the "Agreement" or "Contract") between the Commonwealth of Virginia, hereinafter referred to as "Commonwealth" or "State" or "VITA" (Virginia Information Technologies Agency) and ENVIRONMENTAL SYSTEMS RESEARCH INSTITUTE, INC., hereinafter referred to as "ESRI" or "Contractor", a wholly owned private corporation having its principal place of business at 380 New York Street, Redlands, CA 92373-8100. This Agreement contains the Contractual terms and conditions by which the Commonwealth will establish a Master License Ordering Agreement for State Agencies, Institutions, and other public bodies as defined in Section 2.2-4301. Definitions of the Virginia Public Procurement Act (VPPA), as amended, and hereinafter referred to as "Authorized Users" to acquire "Software" and Software technical support and maintenance services ("Services") pursuant to the Commonwealth's Request For Proposal #2003-41, dated April 4, 2003 (the "RFP") and the Contractor's proposal, dated May 2, 2003, as amended and in response thereto. The Commonwealth's RFP, Contractor's Proposal, any previous agreements, understandings, and arrangements are hereby superseded in their entirety by this Agreement, and this Agreement constitutes the sole and entire agreement of the parties.

Upon award, all orders for Software and Services will be placed directly with the Contractor by Authorized Users.

The Virginia General Assembly passed legislation that abolishes the Department of Information Technology ("DIT") as of July 1, 2003. All activities and functions of DIT have been consolidated into a new agency that is the Virginia Information Technologies Agency ("VITA"). Therefore, for purposes of this Contract ("Agreement") all references to either the Commonwealth, or DIT, or VITA, shall have the same meaning.

2. INTERPRETATION OF AGREEMENT / ORDER OF PRECEDENCE

As used in this Agreement, the following words, phrases, or terms shall have the following meanings:

(a) "Software" means the actual copy of all or any portion of ESRI's proprietary geographic information system (GIS) software technology, computer software code, components, dynamic link libraries (DLLs), and programs delivered on any media, including, but not limited to, alpha, beta, prerelease, restricted version(s), or final

commercial release provided in source, object, or executable code format(s), inclusive of backups, updates, or merged copies permitted hereunder or subsequently supplied under this Agreement.

(b) "Data" means any ESRI or third party data vendor(s) digital data set(s) including, but not limited to, geographic, vector data coordinates, raster, or associated tabular attributes in ESRI® GIS software compatible format(s) supplied under this Agreement.

(c) "Documentation" means all of the printed and digital materials including, but not limited to, user documentation, training documentation, or technical information and briefings supplied under this Agreement.

(d) "License Manager" means the nondestructive license management software program, comprised of a confidential software keycode or hardware key, which controls the distribution of the licensed number of Software copies to requesting end user(s) of Licensee.

(e) "Authorized User" means any "Public body" as defined in Section 2.2-4301. Definitions of the Virginia Public Procurement Act (VPPA) as any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in the VPPA.

(f) "Licensee" means the governmental body that has signed this Agreement or any Authorized User that places an order pursuant to this Agreement.

(g) "Services" means maintenance and technical support services to be provided as delineated herein and described under "Support" ("Support Services Brochure") at www.esri.com. ESRI consulting services are not included in this Agreement.

The documents comprising this Agreement, and their order of precedence in case of conflict, are: (1) this document, consisting of Terms and Conditions labeled 1 through 51, Attachment A, entitled *Software Pricing* with Appendix 1, *ESRI Scope of Use* (E300 dated 8/03), and Appendix 2, *ESRI Client Site Training Terms and Conditions* (E207 1/02), and Attachment B entitled *Lobbying Certificate*; and (2) all executed Orders and their attachments referencing this Agreement.

The terms and conditions of this Contract take precedence over any eVA, or third party, incorporated terms and conditions.

If any term or condition of this Agreement is found to be illegal or unenforceable, it shall be severed, and the validity of the remaining terms and conditions shall not be affected.

Nothing in this Agreement shall be construed as an express or implied waiver of the Commonwealth's sovereign or Eleventh Amendment immunity, or as a pledge of its full faith and credit.

3. HEADINGS NOT CONTROLLING

Headings used in this Contract are for reference purposes only and shall not be considered to be a substantive part of this Contract.

4. APPLICABLE LAWS AND COURTS

This solicitation and any resulting Contract shall be governed in all respects by the laws of the Commonwealth of Virginia and any litigation with respect thereto shall be brought in the courts of the Commonwealth. The Contractor shall comply with all applicable federal, state and local laws, rules and regulations.

5. ANTI-DISCRIMINATION

By submitting their offers, offerors certify to the Commonwealth that they will conform to the provisions of the Federal Civil Rights Act of 1964, as amended, as well as the Virginia Fair Employment Contracting Act of 1975, as amended, where applicable, the Virginians With Disabilities Act, the Americans With Disabilities Act and §2.2-4311 of the Virginia Public Procurement Act. If the award is made to a faith-based organization, the organization shall not discriminate against any recipient of goods, Services, or disbursements made pursuant to the Contract on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and shall be subject to the same rules as other organizations that Contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the public body. (Code of Virginia, § 2.2-4343.1E)

In every Contract over \$10,000 the provisions in a. and b. below apply:

- a. During the performance of this Contract, the Contractor agrees as follows:
 - 1) The Contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except there is a bona fide occupational qualification reasonably necessary to the normal operation of the Contractor. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - 2) The Contractor, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, will state that such Contractor is an equal opportunity employer.
 - 3) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for meeting these requirements.

- b. The Contractor will include the provisions of 1, above, in every subcontract or purchase order over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

6. ETHICS IN PUBLIC CONTRACTING

By submitting their offers, offerors certify that their offers are made without collusion or fraud and that they have not offered or received any kickbacks or inducements from any other offeror, supplier, manufacturer or subcontractor in connection with their offer, and that they have not conferred on any public employee having official responsibility for this procurement transaction any payment, loan, subscription, advance, deposit of money, Services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value was exchanged.

7. IMMIGRATION REFORM AND CONTROL ACT OF 1986

By submitting their offers, offerors certify that they do not and will not during the performance of this Contract employ illegal alien workers or otherwise violate the provisions of the federal Immigration Reform and Control Act of 1986.

8. DEBARMENT STATUS

By submitting their offers, offerors certify that they are not currently debarred by the Commonwealth of Virginia from submitting offers on Contracts for the type of goods and/or services covered by this solicitation, nor are they an agent of any person or entity that is currently so debarred.

9. ANTITRUST

By entering into a Contract, the Contractor conveys, sells, assigns, and transfers to the Commonwealth of Virginia all rights, title and interest in and to all causes of action it may now have or hereafter acquire under the antitrust laws of the United States and the Commonwealth of Virginia, relating to the particular goods or Services purchased or acquired by the Commonwealth of Virginia under said Contract.

10. PAYMENT

a. To Prime Contractor:

- 1) Invoices for items ordered, delivered and accepted shall be submitted by the Contractor directly to the payment address shown on the purchase order/Contract. All invoices shall show the state Contract number and/or purchase order number; social security number (for individual Contractors) or the federal employer identification number (for proprietorships, partnerships, and corporations).

2) Any payment terms requiring payment in less than 30 days will be regarded as requiring payment 30 days after invoice or delivery, whichever occurs last. This shall not affect offers of discounts for payment in less than 30 days, however.

3) All Software or Services provided under this Contract or any Order, that are to be paid for with public funds, shall be billed by the Contractor at the Contract price, regardless of which public agency is being billed.

4) The following shall be deemed to be the date of payment: the date of postmark in all cases where payment is made by mail, or the date of offset when offset proceedings have been instituted as authorized under the Virginia Debt Collection Act.

5) **Unreasonable Charges.** Under certain emergency procurements and for most time and material purchases, final job costs cannot be accurately determined at the time orders are placed. In such cases, Contractors should be put on notice that final payment in full is contingent on a determination of reasonableness with respect to all invoiced charges. Charges that appear to be unreasonable will be researched and challenged, and that portion of the invoice held in abeyance until a settlement can be reached. Upon determining that invoiced charges are not reasonable, the Commonwealth shall promptly notify the Contractor, in writing, as to those charges which it considers unreasonable and the basis for the determination. A Contractor may not institute legal action unless a settlement cannot be reached within thirty (30) days of notification. The provisions of this section do not relieve an agency of its prompt payment obligations with respect to those charges that are not in dispute (Code of Virginia, § 2.2-4363).

b. To Subcontractors:

1) A Contractor awarded a Contract under this solicitation is hereby obligated:

(a) To pay the subcontractor(s) within seven (7) days of the Contractor's receipt of payment from the Commonwealth for the proportionate share of the payment received for work performed by the subcontractor(s) under the Contract; or

(b) To notify the agency and the subcontractor(s), in writing, of the Contractor's intention to withhold payment and the reason.

2) The Contractor is obligated to pay the subcontractor(s) interest at the rate of one percent per month (unless otherwise provided under the terms of the Contract) on all amounts owed by the Contractor that remain unpaid seven (7) days following receipt of payment from the Commonwealth, except for amounts

withheld as stated in (2) above. The date of mailing of any payment by U. S. Mail is deemed to be payment to the addressee. These provisions apply to each sub-tier Contractor performing under the primary Contract. A Contractor's obligation to pay an interest charge to a subcontractor may not be construed to be an obligation of the Commonwealth.

11. TESTING AND INSPECTION

The Commonwealth reserves the right to conduct any test/inspection it may deem advisable to assure Software and Services conform to the Documentation. However, any test/inspection conducted by the Commonwealth or any Authorized User shall not be construed to affect the timeliness of any payment(s) to be made to Contractor for any Software or Services ordered under this Agreement.

12. ASSIGNMENT OF CONTRACT

To the fullest extent permitted by law, the parties agree that Contractor's rights under this Contract shall not be assignable, in whole or in part, to any other party without VITA's written consent, and that any purported assignment or transfer without such consent shall be null and void. If any law limits the right of the parties to prohibit assignment or nonconsensual assignments, the effective date of the assignment shall be as follows. The Contractor shall give the DIT purchasing office prompt written notice of the assignment, signed by authorized representatives of both the Contractor and the assignee. This written notice shall be on VITA's "Assignment Notice/Payment Instruction" form and shall provide all information requested on that form. Copies of the form may be obtained from the VITA Contracts Manager. Upon VITA's acknowledgment of receipt of the properly executed form, the Assignee shall notify the Controller, VITA of the assignment and shall supply the Controller, with a copy of the properly executed form. Any payments made prior to receipt of such notification and form shall not be covered by this assignment.

In the event VITA receives any notice from a third party claiming to be an assignee of any rights of the Contractor under this Contract, Contractor agrees that payment or other performance in respect of those rights shall not be due until at least thirty (30) days after VITA's receipt of the notice required by the above paragraph or receipt of a similarly executed notice confirming the absence or revocation of the purported assignment. The Acquisition Services Directorate (ASD) of VITA shall promptly notify the Contractor of any assignment notice it receives.

13. MODIFICATIONS

This Contract may be modified in accordance with 2.2-4309 of the Code of Virginia. Such modifications may only be made by the representatives noted below, or their authorized designee. No modifications to this Contract shall be effective unless it is in writing and signed by the duly authorized representative of both parties. No term or

provision hereof shall be deemed waived and no breach excused unless such waiver or consent to breach is in writing.

Any Contract or Order issued on a firm fixed price basis may not be increased more than twenty five percent (25%) of \$50,000.00 whichever is greater, without the approval of the Governor of the Commonwealth of Virginia or his authorized designee.

Authorized Representatives:

Commonwealth of Virginia:
Contracts Manager
Dept. of Information Technology
Richmond Plaza Bldg., Lobby Level
110 South 7th Street
Richmond, VA 23219-3931
contracts@dit.state.va.us

Contractor:
ESRI
ATTN: Laura Dangermond, VP
380 New York Street
Redlands, CA 92373-8100
ldangermond@esri.com

Authorized Representative for Legal/Administrative Notice(s):

Contractor:
ESRI
ATTN: Sheron Bealer, Contracts Mgr
380 New York Street
Redlands, CA 92373-8100
sbealer@esri.com

14. TAXES

Sales to the Commonwealth of Virginia are normally exempt from State sales tax. State sales and use tax certificates of exemption, Form ST-12, will be issued upon request, and can be obtained online at <http://www.tax.state.va.us/>. Deliveries against this Contract shall usually be free of Federal excise and transportation taxes. The Commonwealth's excise tax exemption registration number is 54-73-0076K.

15. TRANSPORTATION AND PACKAGING

By submitting their offer, all offerors certify and warrant that the pricing includes shipping and handling and is offered for F.O.B. destination. Except as otherwise specified herein, standard commercial packaging, packing and shipping containers shall be used. All shipping containers shall be legibly marked or labeled on the outside with purchase order number, commodity description, and quantity.

16. INSURANCE

By signing and submitting a proposal under this solicitation, the offeror or offeror certifies that if awarded the Contract, it will have the following insurance coverages at the time the Contract is awarded. For construction Contracts, if any subcontractors are involved, the subcontractor will have workers' compensation insurance in accordance with §§ 2.2-4332 and 65.2-800 et seq. of the Code of Virginia. The offeror or offeror further certifies that the Contractor and any subcontractors will maintain these insurance coverages during the entire term of the Contract and that all insurance coverages will be provided by insurance companies authorized to sell insurance in Virginia by the Virginia State Corporation Commission.

INSURANCE COVERAGES AND LIMITS REQUIRED:

- a. Worker's Compensation - Statutory requirements and benefits.
- b. Employers Liability - \$100,000.
- c. Commercial General Liability - \$500,000 combined single limit. Commercial General Liability is to include Premises/Operations Liability, Software and Completed Operations Coverage, and Independent Contractor's Liability or Owner's and Contractor's Protective Liability. The Commonwealth of Virginia must be named as an additional insured when requiring a Contractor to obtain Commercial General Liability coverage.

17. ANNOUNCEMENT OF AWARD

Upon the award or the announcement of the decision to award a contract as a result of this solicitation, ASD will publicly post such notice on its website at <http://asd.state.va.us/> for a minimum of ten (10) days. Additionally, a public posting of the award will be available on the eVA webpage at <http://awards.dgs.state.va.us/Award-View.asp>.

18. DRUG-FREE WORKPLACE

During the performance of this Contract, the Contractor agrees to (i) provide a drug-free workplace for the Contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the Contractor that the Contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, “drug-free workplace” means a site for the performance of work done in connection with a specific Contract awarded to a Contractor, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the Contract.

19. NONDISCRIMINATION OF CONTRACTORS

An offeror or Contractor shall not be discriminated against in the solicitation or award of this Contract because of race, religion, color, sex, national origin, age, or disability or against faith-based organizations. If the award of this Contract is made to a faith-based organization and an individual, who applies for or receives goods, Services, or disbursements provided pursuant to this Contract objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, Services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, Services, or disbursements from an alternative provider.

20. eVA BUSINESS-TO-GOVERNMENT VENDOR REGISTRATION

The eVA Internet electronic procurement solution, web site portal www.eva.state.va.us, streamlines and automates government purchasing activities in the Commonwealth. The portal is the gateway for vendors to conduct business with state agencies and public bodies.

All vendors desiring to provide goods and/or Services to the Commonwealth shall participate in the eVA Internet e-procurement solution either through the eVA Basic Vendor Registration Service or eVA Premium Vendor Registration Service, and complete the Ariba Commerce Services Network registration.

Vendors are strongly encouraged to register prior to submitting a bid or offer. Failure to register will result in the bid being found non-responsive and rejected. All vendors must register in both the eVA and the Ariba Commerce Services Network Vendor Registration Systems.

a. eVA Basic Vendor Registration Service: \$25 Annual Fee plus a Transaction Fee of 1% per order received. The maximum transaction fee is \$500 per order. eVA Basic Vendor Registration Service includes electronic order receipt, vendor catalog posting, on-line registration, and electronic bidding, as they become available.

b. eVA Premium Vendor Registration Service: \$200 Annual Fee plus a Transaction Fee of 1% per order received. The maximum transaction fee is \$500 per order. eVA Premium Vendor Registration Service includes all benefits of the eVA Basic Vendor Registration Service plus automatic email or fax notification of solicitations and amendments, and ability to research historical procurement data, as they become available.

Effective until July 1, 2003, the Commonwealth will direct AMS not to invoice for the 1% transaction fee for orders issued during the period July 1, 2002, through June 30, 2003, to allow additional time for vendors to become electronically enabled. AMS will continue to invoice for transaction fees accrued prior to July 1, 2002. To enable vendors to analyze the future impact of transaction fees, AMS will issue "no pay" invoices for transaction fees that would normally accrue during the period of July 1, 2002, through June 30, 2003. For contracts that extend beyond June 30, 2003, contractors may request price adjustments to incorporate the eVA transaction fee, as provided in the Price Escalation/De-escalation clause in the Terms and Conditions of the contract.

c. Ariba Commerce Services Network Registration. The Ariba Commerce Services Network (ACSN) registration is required and provides the tool used to transmit information electronically between state agencies and vendors. There is no additional fee for this service.

eVA BUSINESS-TO-GOVERNMENT CONTRACTS

The eVA Internet electronic procurement solution, web site portal www.eva.state.va.us, streamlines and automates government purchasing activities in the Commonwealth. The portal is the gateway for vendors to conduct business with state agencies and public bodies.

Failure to comply with the requirements in a. and b. below will be just cause for the Commonwealth to reject your bid/offer or terminate this contract for default.

Vendors desiring to provide goods and/or Services to the Commonwealth shall participate in the eVA Internet e-procurement solution and agree to comply with the following:

a. Submit a fully executed American Management Systems, Inc., (AMS) Trading Partner Agreement, a copy of which can be accessed and downloaded from www.eva.state.va.us. AMS is the Commonwealth's service provider to implement and host the eVA e-procurement solution.

b. Provide an electronic catalog (price list) for items awarded under a term contract. The format of this electronic catalog shall conform to the eVA Catalog Interchange Format (CIF) Specification that can be accessed and downloaded from www.eva.state.va.us.

21. BREACH

The Contractor shall be deemed in breach of this Agreement if the Contractor (a) fails to make any Software or Service available by the specified delivery date; (b) repeatedly fails to respond to requests for maintenance or other required Service within the time

limits set forth in this Agreement; (c) fails to comply with any other term of this Agreement and fails to cure such noncompliance within ten days (or such greater period as is acceptable to the Commonwealth) following Contractor's receipt of a Show Cause Notice identifying such noncompliance; or (d) fails to provide a written response to the Commonwealth's Show Cause Notice within fifteen (15) days after receiving same.

The Contractor shall not be in breach of this Agreement if its default was due to causes beyond the reasonable control of, and occurred without any fault or negligence on the part of, both the Contractor and its subcontractors. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Commonwealth in either its sovereign or Contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather.

In the event of breach, in addition to any other remedies provided by law, the Commonwealth may cancel its obligations with respect to any or all unaccepted Software or Services. All shipping and handling costs for return of Software shall be borne by the Contractor. In no event shall any failure by the Commonwealth to exercise any remedy available to it be construed as a waiver of or consent to any breach.

22. TERMINATION FOR CONVENIENCE

The Commonwealth may terminate this Contract in whole or in part, for Convenience at any time by submitting to the Contractor, a writing, sixty (60) days prior to the date of termination. The Commonwealth shall be obligated for all outstanding Orders, as per Contract, subsequent to this termination. The Commonwealth shall not be obligated for any other costs in the event of Termination for Convenience.

23. CONTRACTOR COMMITMENTS, WARRANTIES AND REPRESENTATIONS

Any commitment made by the Contractor within the scope of this Contract shall be binding upon Contractor. For the purposes of this Contract, a commitment by the Contractor includes:

- a. Prices and options committed to remain in force over a specified period(s) of time;
- b. Any written warranty or representation made by the Contractor as to Software performance.

24. DELIVERY DATE

The Contractor shall deliver the Software by the delivery date specified in any executed Order referencing the Agreement or within seven (7) calendar days After Receipt of the Order (ARO) if no date is specified. If delivery of Software is not completed within the time specified, the Commonwealth or an Authorized User may cancel the Order without further obligation. The Commonwealth or an Authorized User may postpone any

delivery date by notifying the Contractor at least seven (7) days prior to the delivery date. However, the delivery date shall not be postponed more than a total of thirty (30) days.

25. AVAILABILITY OF SOFTWARE / PRODUCT OFFERINGS

Contractor may, at its sole discretion, discontinue offering any Software, Data, other product, or Service included in this Agreement at any time upon thirty (30) calendar days written notice being provided to the Contracts Manager, VITA.

At any time, at its sole discretion, Contractor may offer new Software, Services, Data, Documentation, or larger quantity discount pricing for consideration by the Commonwealth by providing a thirty (30) calendar day written notice to the Contracts Manager, VITA. Contractor may require additional license terms prior to use of new Software or Data. Upon mutual agreement, this Contract shall be modified to reflect the addition of such new Software, Services, Data, Documentation, or larger quantity discount pricing as proposed by Contractor.

26. SOFTWARE CONDITION

All Software to be supplied by Contractor shall be new.

27. INTELLECTUAL PROPERTY INDEMNIFICATION

Contractor, at its own expense, shall defend any suit brought against the Commonwealth for the infringement of patents, copyrights or trade secrets enforceable in the United States if the claim of infringement is alleged to relate to or arise from the Contractor's or Commonwealth's use of any Software, materials or information prepared, developed or delivered in connection with performance of this Agreement. In such suit, Contractor shall indemnify the Commonwealth, its agents, officers and employees for any loss, liability or expense incurred as a result of such suit.

The purchasing agency shall notify the Contractor of such suit within a reasonable time after learning of it and shall give the Contractor the full right and opportunity to conduct the defense of the suit, subject however to the requirements of Section 2.2-510 and Section 2.2-514 of the Code of Virginia or any successor statute. If principles of governmental or public law are involved, the Commonwealth may, at its option and expense, participate in the defense of the suit.

The Contractor shall not be required to indemnify the Commonwealth for liability arising solely out of the Commonwealth's own specifications or design or solely from the combination of Software furnished hereunder with any Software not supplied by the Contractor.

If any Service becomes, or in the Contractor's opinion, is likely to become, the subject of a claim of infringement, Contractor may, at its option, provide non-infringing substitutes

that are satisfactory to the Commonwealth, or at Contractor's option and expense, may obtain the right for the Commonwealth to continue the use of such Software or Service.

If a Licensed Work is held to infringe and use of such Licensed Work is enjoined, or if in Contractor's opinion a Licensed Work is likely to become the subject of infringement, then the Commonwealth will permit Contractor, at Contractor's option and expense, to: (a) procure for Customer the right to continue to use such Licensed Work, or (b) replace or modify such Licensed Work so that it becomes non-infringing and has the same or additional functionality and comparable or improved performance characteristics, or (c) upon Customer's return of such infringing Licensed Work, refund to Customer the consideration paid for such Licensed Work, less one percent (1%) of the total paid for each month or use by the Commonwealth, whereupon Contractor's continued liability to Customer will cease.

28. NON-APPROPRIATION

All funds for payment of Software or Services ordered under this Contract are subject to the availability of legislative appropriation for this purpose. In the event of non-appropriation of funds by the Legislature for the items under this Contract, the Commonwealth or an Authorized User may cancel an Order for Software or Services for which funds have not been appropriated. Written notice will be provided to the Contractor as soon as possible after legislative action is completed.

If any purchases are to be supported by federal funding, and such funding is not made available, the Commonwealth may terminate the Orders for such purchases that are dependent on such federal funds without further obligation.

29. PRICE PROTECTION/ADJUSTMENTS

The State will not pay any additional costs or higher pricing above those provided for in Schedule A, attached hereto and incorporated herein, entitled "*Software Pricing*" (ESRI MPA Price List E404, State of Virginia, 09/08/03). In no event may the amount of any Order under this Agreement, without adequate consideration, be increased for any purpose.

At its sole discretion, Contractor may change or discontinue sales and support of any Contract Software or Service, at any time, with thirty (30) days prior written notice to the Contracts Manager, VITA by email to contracts@vita.virginia.gov.

Any price decrease effectuated during any Contract term shall be passed on to the Commonwealth. This decrease will become effective upon the completion of written Contract modification, which includes a pricing update to Attachment A (containing such a price decrease) that the Contractor issues to the Commonwealth.

30. TERM

This Agreement shall take effect on the date of its final execution by both parties, and continue for two (2) years, "initial Term". The Commonwealth at its sole discretion may extend this Agreement for three (3) additional one (1) year periods, provided that total orders for new and additional Software licenses and training services under this Agreement exceed fifty thousand dollars (\$50,000) per year, or one hundred thousand dollars (\$100,000) for any two (2)-year period. The Commonwealth will issue a written notification to the Contractor stating the extension period, thirty (30) calendar days prior to the expiration of any current Term or option periods.

31. CONTRACTUAL RECORDS

All Contractual books, records and other documents related to matters under this Contract shall be made available by Contractor to the State and its designated agents for a period of three (3) years after final payment for purposes of audit and examination.

Contractual records are hereby further defined as this Contract and all Orders, invoices or correspondence directly relating to this agreement.

In no event shall the Commonwealth or its agents have the right to audit ESRI's overhead, G&A and profits for the Software or Services offered under this Agreement.

32. LIMITATION OF LIABILITY

To the maximum extent permitted by applicable law, the Contractor's liability under this Contract for loss or damages to government property (excluding databases not subject to a reasonable backup program) caused by use of any defective or deficient Software supplies, Software, and/or Services delivered under this Contract shall not exceed the greater of \$3 million or two (2) times the amount of money paid to the Contractor under this Contract during the twelve (12) month period preceding the event or circumstance giving rise to such liability. The Contractor will not be liable under this Contract for any indirect, incidental, special, or consequential damages, including without limitation damages from loss of profits, revenue, savings, data or use of the supplies, Software, equipment and/or Services delivered under this Contract, arising out of the Commonwealth's use or inability to use the Contractor's Software and/or Services provided hereunder, even if the Contractor has been advised of the possibility of such damages. The first sentence above, will not apply, however, to liability arising from: (a) personal injury or death; (b) defect or deficiency caused by willful misconduct or gross negligence on the part of the Contractor; or (c) circumstances where the Contract expressly provides a right to damages, indemnification or reimbursement. Contractor's liability for damages under this Contract for costs of procurement of substitute goods shall not exceed the amounts actually paid by the Commonwealth for the Software or Services for which the substitute is acquired.

33. CONTRACTUAL DISPUTES

In accordance with Section 2.2-4363 of the Code of Virginia, Contractual claims, whether for money or other relief, shall be submitted in writing to the purchasing agency no later than sixty (60) days after final payment; however, written notice of the Contractor's intention to file such claim must be given to such agency at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. The purchasing agency shall render a final decision in writing within thirty (30) days after its receipt of the Contractor's written claim.

The Contractor may not invoke any available administrative procedure under Section 2.2-4365 of the Code of Virginia nor institute legal action prior to receipt of the purchasing agency's decision on the claim, unless that agency fails to render its decision within thirty (30) days. The decision of the purchasing agency shall be final and conclusive unless the Contractor, within six (6) months of the date of the final decision on the claim, invokes appropriate action under Section 2.2-4364, Code of Virginia or the administrative procedure authorized by Section 2.2-4365, Code of Virginia.

The Virginia Information Technologies Agency, its officers, agents and employees, including, without limitation, the Contracts Manager, are executing this Agreement and any Orders issued hereunder, solely in its or their statutory and regulatory capacities as agent for the Commonwealth agency purchasing and receiving the Software or Services identified in the Appendices to this Agreement or on the subsequent Order in question and need not be joined as a party to any dispute that may arise thereunder.

In the event of any breach by the Commonwealth, Contractor's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this Section. In no event shall Contractor's remedies include the right to terminate any license or technical support Services hereunder, unless a court of competent jurisdiction directs either party to do so.

34. CREDITS

Any credits due the State under the terms of this Contract may be applied against Contractor's invoices with appropriate information attached.

35. TITLE (SOFTWARE DATA AND DOCUMENTATION)

The Contractor represents and warrants that it is the owner of the Software Data and Documentation or, if not the owner, has received all proper authorizations from the owner to license the Software Data and Documentation, and has the full right and power to grant the rights contained in this Contract. Contractor further warrants and represents that the Software product is of original development, and that the package and its use

will not violate or infringe upon any patent, copyright, trade secret or other property right of any other person. The Commonwealth's remedy for any breach of the representations and warranties of this paragraph are as provided in Paragraph 27, *Intellectual Property Indemnification*.

GRANT OF LICENSE

In consideration of the mutual promises and covenants provided herein and for other good and valuable consideration, and conditioned upon compliance with all of the terms and conditions set forth in the Agreement including, but not limited to, Section 45, *Commonwealth's Rights to Computer Software*, Contractor grants to Licensee a personal, nonexclusive, nontransferable license to:

- (a) Use the Software, Data, and Documentation as a single package for Licensee's own internal use only; and
- (b) Access and use any secure ESRI Web site resources made available to Licensee for Licensee's internal use only, provided that Licensee follows ESRI's terms of use policy specified therein. All password or controlled access information provided by ESRI shall be treated as ESRI confidential information.

36. TERM OF SOFTWARE LICENSE

Except for term licenses, all licenses granted under this Agreement are purchased on a non-exclusive, irrevocable perpetual license basis and shall commence upon the delivery of the Software by the Commonwealth. Notwithstanding the foregoing, the Commonwealth may terminate the license at anytime. Upon termination of this Agreement, an Authorized User shall uninstall, remove, and destroy all Software, Data, and Documentation, and any whole or partial copies, modifications, or merged portions in any form and execute and deliver evidence of such destruction to Contractor, which evidence shall be in a form acceptable to Contractor. All licenses granted to any Authorized User of this Agreement are for the use of the Software Product at the computing facilities of any Authorized User at the sites identified in any executed Attachment or Order referencing this Agreement. Except for term licenses, this license is perpetual and, except for an order by a court of competent jurisdiction, in no event shall Contractor's remedies for any breach of this Agreement include the right to terminate any perpetual license provided hereunder.

License Survival – Upon voluntary termination of this Agreement for the convenience of the Commonwealth or the expiration of this Agreement, the Commonwealth or an Authorized User may continue to retain and use such licensed Software, Data, and Documentation in accordance with the Contractor's General License Terms and Conditions; Scope of Use (Appendix 1 to Attachment A); and any other license terms contained herein. Licensee may then directly and separately contract for Software updates, maintenance, and/or technical support service.

37. CONTRACTOR'S WARRANTY/CUSTOMER SERVICE POINT-OF-CONTACT

The Contractor shall provide the Commonwealth with designated points-of-contact and make arrangements to enable its Warranty/Customer Service representatives to receive such notification to permit the Commonwealth to make such contact.

38. SOFTWARE WARRANTY AND DISCLAIMERS

Limited Warranty – For a period of ninety (90) days from the later of the date of keycode issuance or date of delivery of the Software, Data, or Documentation to Licensee, Contractor represents and warrants that (i) the unmodified Software will substantially conform to the Contractor's published Documentation and (ii) the media upon which the Software, Data, and Documentation is provided will be free from defects in materials and workmanship under normal use and service.

Data Disclaimer – If included under this Agreement, the Data has been obtained from sources believed to be reliable, but its accuracy and completeness are not guaranteed. The Data may contain some nonconformities, defects, errors, or omissions. CONTRACTOR AND ITS LICENSOR(S) MAKE NO WARRANTY WITH RESPECT TO THE DATA. Without limiting the generality of the preceding sentence, Contractor and its licensor(s) do not warrant that the Data will meet Licensee's needs or expectations, the use of the Data will be uninterrupted, or that all nonconformities can or will be corrected. Contractor and its licensor(s) are not inviting reliance on this Data, and Licensee should always verify actual Data including, but not limited to, map, spatial, raster, and tabular information.

General Disclaimer – EXCEPT FOR THE ABOVE EXPRESS LIMITED WARRANTIES, CONTRACTOR DISCLAIMS ALL OTHER WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINTERFERENCE, SYSTEM INTEGRATION, AND NONINFRINGEMENT. CONTRACTOR DOES NOT WARRANT THAT THE SOFTWARE, DATA, OR DOCUMENTATION WILL MEET AN AUTHORIZED USER'S NEEDS, OR THAT THE AUTHORIZED USER'S OPERATION OF THE SAME WILL BE UNINTERRUPTED OR ERROR FREE, OR THAT ALL NONCONFORMITIES CAN OR WILL BE CORRECTED.

THE AUTHORIZED USER/LICENSEE EXPRESSLY ACKNOWLEDGES AND AGREES THAT BETA AND EVALUATION SOFTWARE IS DELIVERED "AS-IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINTERFERENCE, SYSTEM INTEGRATION, AND NONINFRINGEMENT. THE AUTHORIZED USER ASSUMES ALL RISK AS TO THE QUALITY AND PERFORMANCE OF THE BETA AND EVALUATION SOFTWARE.

Exclusive Remedy — An Authorized User's/Licensee's exclusive remedy and Contractor's entire liability for breach of the limited warranties set forth in this section entitled Software Warranty shall be limited, at Contractor's sole discretion, to (i) replacement of any defective media; (ii) repair, correction, or a work-around for the Software subject to the Contractor's Support Services Policy; or (iii) return of the license fees paid by an Authorized User/Licensee for the Software, Data, or Documentation that does not meet Contractor's Limited Warranty, provided that the Authorized User/Licensee uninstalls, removes, and destroys all copies of the Software, Data, or Documentation and executes and delivers to Contractor a Certification of Destruction in a form acceptable to Contractor.

39. WARRANTY AGAINST DISABLING CODES

Contractor represents and warrants to the Commonwealth that Contractor does not employ the use of any virus, worm, trapdoor, or backdoor (hereinafter collectively referred to as "Disabling Codes") in the Software that would otherwise intentionally cause the Software to become incapable of being used in the manner in which it was designed or intended; or damage, destroy, or erase an Authorized User/Licensee's data due to the remote activation or implementation of said Disabling Codes by Contractor. However, certain Software does contain a nondestructive, license management software program that administers and controls the distribution of the licensed copies of the Software to Authorized User(s) through the use of a software keycode or hardware key.

40. PERIODIC PROGRESS REPORTS/INVOICES

For Contracts requiring the submission of periodic Contract performance progress reports or program status reports, the offeror will include a section on involvement of small businesses and business owned by women and minorities. This section will specify the actual dollars Contracted to-date with such businesses, actual dollars expended to-date with such businesses and the total dollars planned to be contracted for with such businesses on this Contract. This information shall be provided separately for small businesses, minority-owned businesses and women-owned businesses.

If the Contract does not require the submission of periodic progress reports, the offeror will provide the above required information on actual involvement of small businesses and businesses owned by minorities and women as part of their periodic invoices.

41. FINAL ACTUAL INVOLVEMENT REPORT

The Contractor will submit, prior to completion or at completion of the Contract and subject to final payment, a report on the actual dollars spent with small businesses and businesses owned by women and minorities during the performance of the Contract. At a minimum, this report shall include for each firm Contracted with and for each business class (i.e. small, minority-owned, women-owned) the total actual dollars spent on this

Contract, the planned involvement of the firm and business class as specified in the proposal, and the actual percent of the total estimated Contract value.

42. BUY OUTS – THIRD PARTY ACQUISITION OF CONTRACTOR’S SOFTWARE

Contractor shall promptly notify the DIT Contracts Manager in the event that the intellectual property in or business associated with any Software or Service covered by this Agreement is acquired from the Contractor by a third party or in the event the Contractor or substantially all of its assets is acquired by a third party.

The terms and conditions of this Agreement including but not limited to the license rights and related Services shall not be affected in such event identified above even if the successor or assignee already has an agreement with the Commonwealth covering Software and Services of the type covered by this Agreement. The Contractor’s responsibilities under this Agreement shall not be released by such acquisition. In addition, prior to any acquisition, Contractor shall obtain for the Commonwealth’s benefit the assignee’s agreement to fully perform this Agreement.

The successor or assignee, by taking any benefit, including acceptance of payment, under this Agreement ratifies this Agreement.

The failure of any successor or assignee of the Contractor to acknowledge its obligation to adhere to the terms and conditions of this Agreement shall constitute a breach of this Agreement for which the successor or assignee and the original Contractor shall be liable and subject to debarment.

43. ORDERS

Authorized Users of this Contract may order Software and Services from this Contract by one of the following Order methods:

- a. Purchase Order: An official Purchase Order form issued by an Authorized User.
- b. Delivery Order (DO): A DO issued by the Acquisition Services Directorate, VITA.
- c. EVA: eVA is the Commonwealth’s total e-procurement solution. Contractor shall accept any and all orders issued through eVA.
- d. Charge/Credit Card:
 - i. Any order/payment transaction processed through the Commonwealth’s contract with American Express (AMEX). Each order must not exceed \$5,000, or the then current charge card limit. Payment will made by AMEX to Contractor within three (3) business days.

- ii. Any other order/payment charge or credit card process, such as AMEX, MASTERCARD, or VISA under contract for use by an Authorized User.

This ordering authority is limited to issuing orders for the Software/Services available under this Agreement. Under no circumstances shall any Authorized User/Licensee of the Commonwealth have the authority to modify this Agreement.

Contractor acknowledges that the forgoing is not limited to preclude the Commonwealth from issuing Orders against subject Contract as it so chooses.

Orders, other than for the initial purchase, may be canceled by an Authorized User in whole or in part, upon forty-five (45) days' written notice to Contractor. There will be no cancellation charge for canceled Software unless the Software has been delivered. If the Software has been shipped, the cancellation will require Licensee payment of return shipping costs.

44. INVOICING

The Contractor shall remit each invoice to the ordering entity, or Authorized User. The Contractor shall issue invoices, identifying at a minimum, the components listed below.

- a. manufacturer's product number
- b. product description
- c. price per unit
- d. quantities of merchandise
- e. extended price
- f. date ordered
- g. date delivered
- h. listing of returns

45. COMMONWEALTH'S RIGHTS TO COMPUTER SOFTWARE

Notwithstanding anything to the contrary in this Agreement, the Commonwealth or Authorized User shall have:

Permitted Uses

- Licensee/Authorized User may (i) install and store copies onto electronic storage device(s) and (ii) only use the Software, Data, and Documentation as described in Exhibit 1 set forth herein and in accordance with the licensed configuration on file with ESRI Customer Service or ESRI authorized distributors.
- Licensee/Authorized User may make one (1) copy of the Software, Data, and Documentation for archival purposes during the term of this Agreement. Additionally, Licensee/Authorized User may make routine computer backups of the

Software, Data, and Documentation. Licensee/Authorized User may establish a redundant server for failover operations in the event the primary site fails.

- Licensee/Authorized User may customize the Software using any (i) macro or scripting language, (ii) open application programming interface (API), or (iii) source or object code libraries, but only to the extent that such customization is described in the Documentation.
- Licensee/Authorized User may use the Data only as described in the Distribution Rights section of the help or metadata files delivered with the Software, Data, and Documentation.
- Licensee/Authorized User may use, copy, or prepare derivative works of the Documentation supplied in digital format and thereafter reproduce, display, and redistribute the customized documentation only for Licensee's own internal use. The portion(s) of the Documentation supplied in digital format merged with other software and printed or digital documentation shall continue to be subject to the terms and conditions of this Agreement and shall provide the following copyright attribution notice acknowledging the proprietary rights of ESRI and its licensor(s) in the Documentation supplied in digital format: "Portions of this document include intellectual property of ESRI and its licensor(s) and are used herein under license. Copyright © [Insert the actual copyright date(s) from the source materials] ESRI and its licensor(s). All rights reserved."

Uses Not Permitted

- Licensee/Authorized User shall not sell; rent; lease; sublicense; lend; assign; time-share; or act as a service bureau or Application Service Provider (ASP) that allows third party access to the Software, Data, and Documentation except as provided herein; or transfer, in whole or in part, access to prior or present versions of the Software, Data, or Documentation, any updates, or Licensee's/Authorized User's rights under this Agreement.
- Licensee/Authorized User shall not redistribute the Software, in whole or in part, including, but not limited to, extensions, components, or DLLs without the prior written approval of Contractor as set forth in an appropriate redistribution license agreement.
- Licensee/Authorized User shall not reverse engineer, decompile, or disassemble the Software, Data, or Documentation, except to the extent that such activity is expressly permitted by applicable law notwithstanding this restriction in order to protect Contractor and its licensor(s) trade secrets and proprietary information contained in the Software, Data, or Documentation.
- Licensee/Authorized User shall not make any attempt to circumvent the technological measure(s) (e.g., License Manager, etc.) that controls access to or use of the Software, Data, and Documentation, except to the extent that such activity is expressly permitted by applicable law notwithstanding this restriction.
- Licensee/Authorized User shall not use the Software to transfer or exchange any material where such transfer or exchange is prohibited by copyright or any other law.

- Licensee/Authorized User shall not remove or obscure any Contractor or its licensor(s) patent, copyright, trademark, or proprietary rights notices contained in or affixed to the Software, Data, or Documentation.

Nothing contained herein shall be construed to restrict or limit the Commonwealth's or Authorized User's rights to use any technical data which the Commonwealth or Authorized User may already possess or acquire under proper authorization from other sources.

46. CONFIDENTIALITY

Commonwealth agrees that Software is proprietary to Contractor and has been developed or acquired at Contractor's expense and that it shall hold and use the Software in the same manner as it would deal with its own confidential information. Commonwealth shall not knowingly divulge, nor knowingly permit any of its employees, agents, or representatives to divulge, any proprietary information with respect to the Software, the technology embodied therein, or any other documentation, models, descriptions, forms, instructions or other proprietary information relating thereto, except as specifically authorized by Contractor, in writing, or as may be required by the laws of the Commonwealth of Virginia.

Commonwealth shall take all reasonable steps necessary or appropriate to insure compliance with this Section by the Commonwealth's employees, agents and representatives, including copying reproducible legends and markings on all physical components of the Software.

The Commonwealth's obligation under this Section shall terminate three years after the Commonwealth ceases using the Software containing the proprietary information.

47. COMPLIANCE WITH FEDERAL LOBBYING ACT

a. Contractor shall not, in connection with this Agreement, engage in any activity prohibited by 31 U.S.C.A. Section 1352 (entitled "Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions") or by the regulations issued from time to time thereunder (together, the "Lobbying Act"), and shall promptly perform all obligations mandated by the Lobbying Act in connection with this Agreement, including, without limitation, obtaining and delivering to the Commonwealth all necessary certifications and disclosures.

b. Contractor is hereby advised that a significant percentage of the funds used to pay Contractor's invoices under this Agreement may be federal funds. Under no circumstances shall any provision of this Agreement be construed as requiring or requesting the Contractor to influence or attempt to influence any person identified in 31 U.S.C.A. Section 1352 (a) (1) in any matter.

c. A representative of Contractor shall sign the certification attached as Attachment "B" and deliver such certification to the Commonwealth simultaneously with the execution and delivery of this Agreement. Contractor shall have the certification signed by a representative with knowledge of the facts and shall fulfill the promises of undertakings set forth in the certification.

48. EXCLUSIVITY OF TERMS AND CONDITIONS

The Virginia Information Technologies Agency (VITA) will not sign or execute any additional contract, license or other agreement, including shrink-wrap Software, containing contractual terms and conditions as a result of this procurement. Any documents signed by persons other than the Contracts Manager, VITA, shall have no validity and the attached Terms and Conditions shall supersede all such agreements. Vendors should read and understand all of the Terms and Conditions prior to submitting a bid.

49. CONTRACTOR'S REPORT OF SALES

Contractor must agree to provide reporting on a monthly basis that breaks out the spend amounts by agency, Institution of Higher Education, Municipality and other Public Body, as well as the departmental and/or divisional levels that is buying. Reports are to be provided on the 15th of each month, reporting transactions that took place in the immediately prior month. At any time thereafter, as appropriate, additional reports may be agreed upon. All reports shall be forwarded electronically via Email to the Commonwealth using a Microsoft Excel Spreadsheet format to be provided to Contractor. Generally, the Commonwealth wants to capture the following types of information, at a minimum:

- a. Purchase Order Number
- b. Customer Number
- c. Invoice Quantity
- d. Product Number
- e. Product Name
- f. Price Paid
- g. Invoice Number
- h. Customer Name

Electronic copies of reports shall be provided to the Commonwealth no later than 15 days following the end of each month.

Contractor will be provided a listing of the proper name and spelling of each agency and Institution and Public Body that you will agree to use in your reporting. If the Commonwealth three (3) digit user code is not contained in the purchase order, ESRI has no obligation to use the Commonwealth listing reference for that purchase order.

50. SURCHARGE ADJUSTMENT

The Contractor must pay the Department of General Services (DGS), a Surcharge Adjustment (SCA) fee under this contract. The Contractor must remit the SCA within 30 days after the end of each quarterly reporting period as established in the clause entitled "Contractor's Report of Sales". The SCA equals two percent (2%) of the total quarterly sales reported. Contractor shall remit the SCA together with a copy of the Contractor's Report of Sales as delineated in the paragraph herein entitled "Contractor's Report of Sales". The SCA reimburses the Commonwealth and defrays the costs for Spend Management procurements and the administration of the subsequent awards. The SCA amount due must be paid by check with identification of "Contract number", "report amounts", and "report period", on either the check stub or other remittance material. DGS may at its discretion, agree to an electronic funds transfer, in lieu of a check, however in the absence of an express written agreement from DGS that validates agreement, then the payment shall be made by check as described herein made payable to the Department of General Services.

If the full amount of the SCA is not paid within 30 calendar days after the end of the applicable reporting period, it shall constitute a Contract debt to the Commonwealth of Virginia, and the State may exercise all rights and remedies available under law. Failure to submit sales reports, falsification of sales reports, and or failure to pay the SCA in a timely manner may result in termination or cancellation of this Contract. Willful failure or refusal to furnish the required reports, falsification of sales reports, or failure to make timely payment of the SCA constitutes sufficient cause for terminating this Contract for default.

It is the intent of the Commonwealth to capture 2% of all sales, including but not limited to temporary reduced pricing, fire sales, one time sales, trade ins, and promotional items that have been marked down under this Contract.

51. NON-VISUAL ACCESS TO TECHNOLOGY

All information technology which, pursuant to this Agreement, is purchased or upgraded by or for the use of any State agency or institution or political subdivision of the Commonwealth (the "Technology") shall comply with the following non-visual access standards from the date of purchase or upgrade until the expiration of this Agreement:

- (i) Effective, interactive control and use of the Technology shall be readily achievable by non-visual means;
- (ii) The Technology equipped for non-visual access shall be compatible with information technology used by other individuals with whom any blind or visually impaired user of the Technology interacts;
- (iii) Non-visual access technology shall be integrated into any networks used to share communications among employees, program participants or the public; and

(iv) The technology for non-visual access shall have the capability of providing equivalent access by non-visual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired.

Compliance with the foregoing non-visual access standards shall not be required if the head of the using agency, institution or political subdivision determines that (i) the Technology is not available with non-visual access because the essential elements of the Technology are visual and (ii) non-visual equivalence is not available.

Installation of hardware, Software, or peripheral devices used for non-visual access is not required when the Technology is being used exclusively by individuals who are not blind or visually impaired, but applications programs and underlying operating systems (including the format of the data) used for the manipulation and presentation of information shall permit the installation and effective use of non-visual access Software and peripheral devices.

If requested, the Contractor must provide a detailed explanation of how compliance with the foregoing non-visual access standards is achieved and a validation of concept demonstration.

The requirements of this Paragraph shall be construed to achieve full compliance with the Information Technology Access Act, 2.2-3500 through 2.2-3504 of the Code of Virginia.

REMEDY FOR NON-COMPLIANCE

For any non-compliance by Contractor of the requirements of the Non-visual Access to Technology Section, the sole remedy for commercial off-the-shelf Software is return of the copy of Software for such visually-impaired users and refund of the license fee paid for such copy.

PERSONS SIGNING THIS CONTRACT ARE AUTHORIZED REPRESENTATIVES OF EACH PARTY TO THIS CONTRACT AND ACKNOWLEDGE THAT EACH PARTY AGREES TO BE BOUND BY THE TERMS AND CONDITIONS OF THE CONTRACT.

ENVIRONMENTAL SYSTEMS RESEARCH INSTITUTE, INC.

BY: 

NAME: LAURA DANGERMOND

TITLE: Vice President

DATE: SEP 10 2003

DATE: _____

COMMONWEALTH OF VIRGINIA

BY: 

NAME: Robert E. Gleason

TITLE: Technology Contracts Mgr

DATE: 9/12/03

DATE: _____

ATTACHMENT "B"
TO
CONTRACT VA-030700-ESRI

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief, that:

a. No Federal appropriated funds have been paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal Contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal Contract, grant, loan, or cooperative agreement.

b. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

c. The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and Contracts under grants, loans and cooperative agreements) and that all sub-recipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Signature:



Printed Name:

Laura Dangermond

Organization:

Environmental Systems Research Institute, Inc.

Date:

SEP 10 2003